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Philmar Care, LLC d/b/a San Fernando Post Acute Hospital and Juan Cortes. Case 31–CA–133242

December 11, 2015

DECISION AND ORDER

BY MEMBERS MISCIMARRA, HIROZAWA,
AND MCFERRAN

On May 6, 2014, Administrative Law Judge Amita Baman Tracy issued the attached decision. The Respondent filed exceptions and a supporting brief, and the Charging Party filed an answering brief. The General Counsel filed exceptions and a brief in support and the Respondent filed a brief in opposition.

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has considered the decision and the record in light of the exceptions and briefs and has decided to affirm the judge's rulings, findings, and conclusions, and to adopt the recommended Order, as modified and set forth in full below.¹

The judge found, applying the Board's decisions in *Murphy Oil USA Inc.*,² and *D. R. Horton*,³ that the Respondent violated Section 8(a)(1) of the Act by maintaining and enforcing an arbitration provision that requires employees, as a condition of employment, to resolve through binding arbitration any claims "aris[ing] out of the employment context." The provision excludes "claims arising under the National Labor Relations Act" We adopt the judge's finding that the Respondent violated Section 8(a)(1) of the Act by maintaining and enforcing the binding arbitration provision, but we do not adopt her entire rationale.

Juan Cortes, the Charging Party, worked for the Respondent from about September 7, 2011 through October 30, 2012. As part of his application process, Cortes signed an "Employee Acknowledgment and Agreement," which states in relevant part:

I also understand that the Facility utilizes a voluntary system for alternative dispute resolution, which involves binding arbitration to resolve all disputes, which may arise out of the employment context. Because of

the mutual benefits (such as reduced expenses and increased efficiency) which private binding arbitration can provide both the Facility and myself, I voluntarily agree that any claim, dispute, and/or controversy [. . .] arising from, related to, or having any relationship or connection whatsoever with my seeking employment with, employment by, or other association with the Facility, whether based on tort, contract, statutory, or equitable law, or otherwise (with the sole exception of claims arising under the National Labor Relations Act which are brought before the National Labor Relations Board, claims for medical and disability benefits under the California Worker's Compensation Act, and Employment Development Office claims) shall be submitted to and determined exclusively by binding arbitration under the Federal Arbitration Act.

On April 18, 2013, Cortes filed a class action wage and hour complaint in the Los Angeles Superior Court, on behalf of himself and all others similarly situated. On May 9, 2014, the Respondent filed a motion to compel arbitration and dismiss class action claims, seeking to dismiss the case and compel Cortes to arbitrate his claims individually. The Superior Court granted the Respondent's motion to compel and stayed the class-wide claims. The Respondent stipulated that since May 9, 2014, it has interpreted the arbitration provision to require employees to assert covered claims in individual arbitration.

The Respondent's arbitration provision does not expressly address whether employees may assert a group or class grievance in arbitration. Thus, in affirming the violation, we do not rely on the judge's finding that the provision explicitly restricts Section 7 rights, or that employees would reasonably construe the provision to restrict Section 7 activity, under the first prong of *Lutheran Heritage Village-Livonia*, 343 NLRB 646 (2004). Instead, relying on the motion to compel and the Respondent's subsequent interpretation of the arbitration provision to require individual binding arbitration, we find that the Respondent has unlawfully maintained its arbitration provision in violation of Section 8(a)(1) by unlawfully applying the arbitration provision to restrict Section 7 activity under the third prong of *Lutheran Heritage*, 343 NLRB at 647. See *Countrywide Financial Corp.*, 362 NLRB No. 165 (2015), and *Leslie's PoolMart*, 362 NLRB No. 184, slip op. at 1 fn. 3 (2015).⁴

¹ We have modified the judge's recommended Order and substituted a new notice consistent with this decision, and to conform to the Board's standard remedial language and the violations found.

² 361 NLRB No. 72 (2014), enf. denied in relevant part No. 14–60800, 2015 WL 6457613, ___ F.3d. ___ (5th Cir. Oct. 26, 2015).

³ 357 NLRB No. 184 (2012), enf. denied in relevant part 737 F.3d 344 (5th Cir. 2013).

⁴ The parties stipulated that the arbitration provision was a condition of employment between September 2, 2011, and October 30, 2012. The Respondent continued to maintain the provision after that date. The General Counsel excepts to the judge's failure to find a violation after October 30, 2012, based on a lack of evidence as to whether the provi-

Furthermore, because the Respondent has interpreted the arbitration provision in a way that restricts Section 7 activity and is plainly unlawful under *D.R. Horton* and *Murphy Oil*, we adopt the judge's finding that the Respondent's court action to enforce the unlawful interpretation had an illegal objective under *Bill Johnson's*⁵ and violated Section 8(a)(1).

ORDER

The National Labor Relations Board orders that the Respondent, Philmar Care, LLC d/b/a San Fernando Post

sion continued to be required as a condition of employment. The Board has since held that an arbitration agreement that precludes collective action in all forums is unlawful whether mandatory or not. See *On Assignment Staffing Services*, 362 NLRB No. 189, slip op. at 1, 5–8 (2015).

The Respondent contends that because the Charging Party could have avoided signing the arbitration provision by declining employment with Respondent and seeking employment elsewhere, its arbitration provision is voluntary and therefore does not fall within the prescriptions of *Murphy Oil* and *D. R. Horton*. The claim is obviously meritless. If the Respondent's view were correct, the freedom of an employee to quit and pursue employment elsewhere would be a valid defense to many unfair labor practices.

We disagree with our dissenting colleague that arbitration agreements that preclude class or collective actions do not violate the Act, for the reasons stated in *Murphy Oil*, 361 NLRB No. 72, slip op. at 1–21, and in *Bristol Farms*, 363 NLRB No. 45 (2015). Our dissenting colleague cites the Supreme Court's decision in *Stolt-Nielsen S.A. v. AnimalFeeds International Corp.*, 559 U.S. 662 (2010), as support for his position. But our decision today does not conflict with the principle that a "party may not be compelled under the [Federal Arbitration Act] to submit to class arbitration unless there is a contractual basis for concluding that the party agreed to do so." *Id.* at 684. We do not require the Respondent to submit to class arbitration. Instead, we apply the rule of *Murphy Oil* and *D. R. Horton*: an employer may not preclude collective action in all forums, judicial and arbitral, as the Respondent did here. See *Countrywide Financial*, supra, slip op. at 4.

⁵ See *Bill Johnson's Restaurants v. NLRB*, 461 U.S. 731, 747 (1983) ("If a violation is found, the Board may order the employer to reimburse the employees whom he had wrongfully sued for their attorneys' fees and other expenses" as well as "any other proper relief that would effectuate the policies of the Act."). Consistent with our decision in *Murphy Oil*, supra, slip op. at 21, and *Countrywide Financial Corp.*, 362 NLRB No. 165 (2015), we amend the judge's remedy and shall order the Respondent to reimburse Juan Cortes for all reasonable expenses and legal fees, with interest, incurred in opposing the Respondent's unlawful motion in the Superior Court of California, City of Los Angeles, to compel individual arbitration of his class or collective claims. Interest shall be computed in the manner prescribed in *New Horizons*, 283 NLRB 1173 (1987), compounded daily as prescribed in *Kentucky River Medical Center*, 356 NLRB No. 8 (2010). See *Teamsters Local 776 (Rite Aid)*, 305 NLRB 832, 835 fn. 10 (1991) ("[I]n make-whole orders for suits maintained in violation of the Act, it is appropriate and necessary to award interest on litigation expenses"), *enfd.* 973 F.2d 230 (3d Cir. 1992).

We also amend the judge's remedy to order the Respondent to notify the court that it has rescinded or revised the arbitration provision and to inform the court that it no longer opposes Juan Cortes' lawsuit on the basis of the arbitration provision.

Acute Hospital, Sylmar, California, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Maintaining and/or enforcing an arbitration provision that requires employees as a condition of employment to waive the right to maintain class or collective actions in all forums, whether arbitral or judicial.

(b) In any like or related manner interfering with, restraining, or coercing employees in the exercise of rights guaranteed by Section 7 of the Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act.

(a) Rescind the arbitration provision in all of its forms, or revise it in all of its forms to make clear to employees that the arbitration provision does not constitute a waiver of their right to maintain employment-related joint, class, or collective actions in all forums.

(b) Notify all current and former employees who were required to sign or otherwise become bound to the mandatory arbitration provision in any form that it has been rescinded or revised and, if revised, provide them a copy of the revised provision.

(c) Notify the Superior Court of California, City of Los Angeles, in Case No. BC 506333, that it has rescinded or revised the mandatory arbitration provision upon which it based its motion to dismiss and compel individual arbitration of the claims of Juan Cortes, and inform the court that it no longer opposes the lawsuit on the basis of that provision.

(d) In the manner set forth in this decision, reimburse Juan Cortes and any other plaintiffs in Case No. BC 506333 for any reasonable attorneys' fees and litigation expenses that he may have incurred in opposing the Respondent's motion to compel individual arbitration.

(e) Within 14 days after service by the Region, post at its facility in Sylmar, California, copies of the attached notice marked "Appendix."⁶ Copies of the notice, on forms provided by the Regional Director for Region 31, after being signed by the Respondent's authorized representative, shall be posted by the Respondent and maintained for 60 consecutive days in conspicuous places, including all places where notices to employees are customarily posted. In addition to physical posting of paper notices, the notices shall be distributed electronically, such as by email, posting on an intranet or an internet site, and/or other electronic means, if the Respondent customarily communicates with its employees by such

⁶ If this Order is enforced by a judgment of a United States court of appeals, the words in the notices reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."

means. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material. If the Respondent has gone out of business or closed the facility involved in these proceedings, the Respondent shall duplicate and mail, at its own expense, a copy of the notice to all current employees and former employees employed by the Respondent at any time since May 9, 2014, and any current or former employees against whom the Respondent has enforced its mandatory arbitration agreement since May 9, 2014.

(f) Within 21 days after service by the Region, file with the Regional Director for Region 31 a sworn certification of a responsible official on a form provided by the Region attesting to the steps that the Respondent has taken to comply.

Dated, Washington, D.C. December 11, 2015

Kent Y. Hirozawa, Member

Lauren McFerran, Member

(SEAL) NATIONAL LABOR RELATIONS BOARD

MEMBER MISCIMARRA, dissenting.

In this case, the Respondent required employees to sign an “Employee Acknowledgment and Agreement” (Agreement) that provided for the arbitration of non-NLRA employment-related claims. The Agreement made no mention of group or class arbitration. Charging Party Juan Cortes signed the Agreement and later filed a class action lawsuit against the Respondent in State court alleging wage and hour claims. In reliance on the Agreement, the Respondent filed a motion to compel arbitration of Cortes’s individual claims. The court granted the motion.¹

My colleagues find that that the Agreement violates Section 8(a)(1) of the National Labor Relations Act (the Act or NLRA) under *Lutheran Heritage Village–*

¹ The parties attached the court’s order to the Joint Stipulation of Facts as Exh. E. The court granted the motion to compel arbitration of Cortes’ claims, except for his cause of action under the California Private Attorneys General Act of 2004 (PAGA). The court did not pass on whether the arbitration was to proceed on a class or individual basis, finding that to be a question of contract interpretation for the arbitrator to decide.

*Livonia*² on the basis that the Respondent applied the Agreement to require individual arbitration. In other words, it applied the Agreement as a waiver of class-type treatment of non-NLRA claims.³ My colleagues further find unlawful the Respondent’s enforcement of the Agreement by filing a motion to compel arbitration. I respectfully dissent from these findings for the reasons explained in my partial dissenting opinion in *Murphy Oil USA, Inc.*⁴

I agree that an employee may engage in “concerted” activities for “mutual aid or protection” in relation to a claim asserted under a statute other than NLRA.⁵ However, Section 8(a)(1) of the Act does not vest authority in the Board to dictate any particular procedures pertaining to the litigation of non-NLRA claims, nor does the Act render unlawful agreements in which employees waive class type treatment of non-NLRA claims. To the contrary, as discussed in my partial dissenting opinion in *Murphy Oil*, NLRA Section 9(a) protects the right of every employee as an “individual” to “present” and “ad-

² 343 NLRB 646 (2004).

³ My colleagues rely on the Board’s holding in *Lutheran Heritage*, which is sometimes referred to as *Lutheran Heritage* “prong three,” that a policy, work rule or other provision will be unlawful if it “has been applied to restrict the exercise of Section 7 rights.” *Id.* at 647. This differs from another holding in *Lutheran Heritage*, sometimes referred to as *Lutheran Heritage* “prong one,” under which a policy, work rule or other provision is invalidated if “employees would reasonably construe the language to prohibit Section 7 activity.” *Id.* I have expressed disagreement with *Lutheran Heritage* prong one, and I advocate that the Board formulate a different standard in an appropriate future case regarding facially neutral policies, work rules, and handbook provisions. See, e.g., *Lily Transportation Corp.*, 362 NLRB No. 54, slip op. at 1 fn. 3 (2015); *Conagra Foods, Inc.*, 361 NLRB No. 113, slip op. at 8 fn. 2 (2014); *Triple Play Sports Bar & Grille*, 361 NLRB No. 31, slip op. at 10 fn. 3 (2014), *affd.* sub nom. *Three D, LLC v. NLRB*, Nos. 14–3284, –3814, 2015 WL 6161477 (2d Cir. Oct. 21, 2015). In the instant case, for the reasons noted in the text, I disagree with my colleagues’ finding in reliance on *Lutheran Heritage* prong three that the Employee Acknowledgment and Agreement has been unlawfully “applied to restrict the exercise of Section 7 rights.”

⁴ 361 NLRB No. 72, slip op. at 22–35 (2014) (Member Miscimarra, dissenting in part). The Board majority’s holding in *Murphy Oil* invalidating class-action waiver agreements was recently denied enforcement by the Court of Appeals for the Fifth Circuit. *Murphy Oil USA, Inc. v. NLRB*, No. 14–60800, 2015 WL 6457613 (5th Cir. Oct. 26, 2015).

⁵ I agree that non-NLRA claims can give rise to “concerted” activities engaged in by two or more employees for the “purpose” of “mutual aid or protection,” which would come within the protection of NLRA Sec. 7. See *Murphy Oil*, 361 NLRB No. 72, slip op. at 23–25 (Member Miscimarra, dissenting in part). However, the existence or absence of Sec. 7 protection does not depend on whether non-NLRA claims are pursued as a class or collective action, but on whether Sec. 7’s statutory requirements are met—an issue separate and distinct from whether an individual employee chooses to pursue a claim as a class or collective action. *Id.*; see also *Beyoglu*, 362 NLRB No. 152, slip op. at 4–5 (2015) (Member Miscimarra, dissenting).

just” grievances “at any time.”⁶ This aspect of Section 9(a) is reinforced by Section 7 of the Act, which protects each employee’s right to “refrain from” exercising the collective rights enumerated in Section 7.⁷ Thus, I believe it is clear that (i) the NLRA creates no substantive right for employees to insist on class-type treatment of non-NLRA claims;⁸ (ii) a class-waiver agreement pertaining to non-NLRA claims does not infringe on any NLRA rights or obligations, which has prompted the overwhelming majority of courts to reject the Board’s position regarding class waiver agreements;⁹ and (iii) enforcement of a class action waiver as part of an arbitra-

⁶ *Murphy Oil*, above, slip op. at 30–34 (Member Miscimarra, dissenting in part). Sec. 9(a) states: “Representatives designated or selected for the purposes of collective bargaining by the majority of the employees in a unit appropriate for such purposes, shall be the exclusive representatives of all the employees in such unit for the purposes of collective bargaining in respect to rates of pay, wages, hours of employment, or other conditions of employment: Provided, That *any individual employee or a group of employees shall have the right at any time to present grievances to their employer and to have such grievances adjusted*, without the intervention of the bargaining representative, as long as the adjustment is not inconsistent with the terms of a collective-bargaining contract or agreement then in effect: Provided further, That the bargaining representative has been given opportunity to be present at such adjustment” (emphasis added). The Act’s legislative history shows that Congress intended to preserve every individual employee’s right to “adjust” any employment-related dispute with his or her employer. See *Murphy Oil*, above, slip op. at 31–32 (Member Miscimarra, dissenting in part).

⁷ My colleagues note that the record is unclear whether the Agreement was a condition of employment after Charging Party Cortes left his employment on October 30, 2012. To the extent the Agreement was thereafter voluntary, the legality of the Agreement is even more self-evident. See *Bristol Farms*, 363 NLRB No. 45, slip op. at 3 (2015) (Member Miscimarra, dissenting).

⁸ When courts have jurisdiction over non-NLRA claims that are potentially subject to class treatment, the availability of class-type procedures does not rise to the level of a substantive right. See *D.R. Horton, Inc. v. NLRB*, 737 F.3d 344, 362 (5th Cir. 2013) (“The use of class action procedures . . . is not a substantive right.”) (citations omitted), petition for rehearing en banc denied No. 12-60031 (5th Cir. 2014); *Deposit Guaranty National Bank v. Roper*, 445 U.S. 326, 332 (1980) (“[T]he right of a litigant to employ Rule 23 is a procedural right only, ancillary to the litigation of substantive claims.”).

⁹ The Fifth Circuit has twice denied enforcement of Board orders invalidating a mandatory arbitration agreement that waived class-type treatment of non-NLRA claims. See *Murphy Oil USA, Inc. v. NLRB*, above; *D.R. Horton, Inc. v. NLRB*, above. The overwhelming majority of courts considering the Board’s position have likewise rejected it. See *Murphy Oil*, 361 NLRB No. 72, slip op. at 34 (Member Miscimarra, dissenting in part); id., slip op. at 36 fn. 5 (Member Johnson, dissenting) (collecting cases); see also *Patterson v. Raymours Furniture Co.*, No. 14-CV-5882 (VEC), 2015 WL 1433219 (S.D.N.Y. Mar. 27, 2015); *Nanavati v. Adecco USA, Inc.*, No. 14-CV-04145-BLF, 2015 WL 1738152 (N.D. Cal. Apr. 13, 2015), motion to certify for interlocutory appeal denied 2015 WL 4035072 (N.D. Cal. June 30, 2015); *Brown v. Citicorp Credit Services, Inc.*, No. 1:12-cv-00062-BLW, 2015 WL 1401604 (D. Idaho Mar. 25, 2015) (granting reconsideration of prior determination that class waiver in arbitration agreement violated NLRA).

tion agreement is also warranted by the Federal Arbitration Act (FAA).¹⁰ Although questions may arise regarding the enforceability of particular agreements that waive class or collective litigation of non-NLRA claims, I believe these questions are exclusively within the province of the court or other tribunal that, unlike the NLRB, has jurisdiction over such claims.

Because I believe the Respondent’s Agreement, as applied, was lawful under the NLRA, I would find it was similarly lawful for the Respondent to file a motion in State court seeking to enforce the Agreement.¹¹ It is relevant that the State court that had jurisdiction over the non-NLRA claims granted the Respondent’s motion to compel arbitration. That the Respondent’s motion was reasonably based is also supported by the multitude of court decisions that have enforced similar agreements.¹² As the Fifth Circuit recently observed after rejecting (for the second time) the Board’s position regarding the legality of class waiver agreements: “[I]t is a bit bold for [the Board] to hold that an employer who followed the reasoning of our *D. R. Horton* decision had no basis in fact or law or an ‘illegal objective’ in doing so. The Board might want to strike a more respectful balance between its views and those of circuit courts reviewing its orders.”¹³ I also believe that any Board finding of a violation based on the Respondent’s meritorious State court

¹⁰ For the reasons expressed in my *Murphy Oil* partial dissent, and those thoroughly explained in former Member Johnson’s dissent in *Murphy Oil*, the FAA requires that the arbitration agreement be enforced according to its terms. *Murphy Oil*, above, slip op. at 34 (Member Miscimarra, dissenting in part); id., slip op. at 49–58 (Member Johnson, dissenting).

¹¹ The Board’s unfair labor practice finding based on the Respondent’s application of the Agreement—which was silent regarding class arbitration—is particularly troublesome, since the Respondent applied the Agreement in the manner required by the Supreme Court’s interpretation of the FAA. In *Stolt-Nielsen S.A. v. Animal Feeds International Corp.*, 559 U.S. 662 (2010), the Court wrote:

[A] party may not be compelled under the FAA to submit to class arbitration unless there is a contractual basis for concluding that the party agreed to do so. . . . An implicit agreement to authorize class-action arbitration . . . is not a term that the arbitrator may infer solely from the fact of the parties’ agreement to arbitrate. This is so because class-action arbitration changes the nature of arbitration to such a degree that it cannot be presumed the parties consented to it by simply agreeing to submit their disputes to an arbitrator.

Id. at 684–685 (emphasis in original). There is no basis in the plain language of the Agreement to conclude that the Respondent had agreed to class arbitration. Thus, the Respondent’s motion to compel Cortes to arbitrate his claims individually was well-founded in the FAA as authoritatively interpreted by the Supreme Court.

¹² See, e.g., *Murphy Oil, Inc. v. USA v. NLRB*, above; *Johnmohammadi v. Bloomingdale’s*, 755 F.3d 1072 (9th Cir. 2014); *D. R. Horton, Inc. v. NLRB*, above; *Owen v. Bristol Care, Inc.*, 702 F.3d 1050 (8th Cir. 2013); *Sutherland v. Ernst & Young LLP*, 726 F.3d 290 (2d Cir. 2013).

¹³ *Murphy Oil USA, Inc. v. NLRB*, above, at slip op. 6.

motion to compel arbitration would improperly risk infringing on the Respondent's rights under the First Amendment's Petition Clause. See *Bill Johnson's Restaurants v. NLRB*, 461 U.S. 731 (1983); *BE & K Construction Co. v. NLRB*, 536 U.S. 516 (2002); see also my partial dissent in *Murphy Oil*, above, 361 NLRB No. 72, slip op. at 33-35. Finally, for similar reasons, I believe the Board cannot properly require the Respondent to reimburse the Charging Party for its attorneys' fees in the circumstances presented here. *Murphy Oil*, above, 361 NLRB No. 72, slip op. at 35.

Accordingly, I respectfully dissent.

Dated, Washington, D.C. December 11, 2015

Philip A. Miscimarra, Member

NATIONAL LABOR RELATIONS BOARD

APPENDIX

NOTICE TO EMPLOYEES

POSTED BY ORDER OF THE

NATIONAL LABOR RELATIONS BOARD

An Agency of the United States Government

The National Labor Relations Board has found that we violated Federal labor law and has ordered us to post and obey this notice.

FEDERAL LAW GIVES YOU THE RIGHT TO

Form, join, or assist a union

Choose representatives to bargain with us on your behalf

Act together with other employees for your benefit and protection

Choose not to engage in any of these protected activities.

WE WILL NOT maintain and/or enforce an arbitration provision that as a condition of employment requires our employees to waive the right to maintain class or collective actions for employment-related claims in all forums, arbitral or judicial.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce you in the exercise of rights listed above.

WE WILL rescind the arbitration provision in all of its forms or revise it in all of its forms to make clear that the arbitration provision does not constitute a waiver of your right to maintain employment-related joint, class, or collective actions in all forums.

WE WILL notify all current and former employees who were required to sign or otherwise become bound to the arbitration provision in all of its forms that the provision has been rescinded or revised and, if revised, WE WILL provide them a copy of the revised provision.

WE WILL notify the Superior Court of California, City of Los Angeles, that we have rescinded or revised the arbitration provision upon which we based our motion to dismiss and compel individual arbitration of the claims of Juan Cortes, and inform the court that we no longer oppose collective action on the basis of that provision.

WE WILL reimburse Juan Cortes and any other plaintiffs in Case No. BC 506333 for any reasonable attorneys' fees and litigation expenses that he may have incurred in opposing the Respondent's motion to compel individual arbitration.

PHILMAR CARE, LLC D/B/A SAN FERNANDO POST ACUTE HOSPITAL

The Board's decision can be found at www.nlrb.gov/case/31-CA-133242 or by using the QR code below. Alternatively, you can obtain a copy of the decision from the Executive Secretary, National Labor Relations Board, 1015 Half Street, S.E., Washington, D.C. 20570, or by calling (202) 273-1940.



Rudy L. Fong Sandoval, Esq., for the General Counsel.

Jeffrey S. Ranen, Esq. and *William C. Sung, Esq.*, for the Respondent.

Daniel J. Bass, Esq. and *Matthew J. Matern, Esq.*, for the Charging Party.

DECISION

STATEMENT OF THE CASE

AMITA BAMAN TRACY, Administrative Law Judge. This case is before me on the parties' March 6, 2015 joint motion to transfer proceedings to the Division of Judges and stipulation of the facts and issues presented (hereinafter, Joint Motion), which

I approved on March 9, 2015 (Jt. Exh. 1).¹ Juan Cortes (Charging Party or Cortes) filed the charge, first-amended charge, and second-amended charge in Case 31–CA–133242 on July 21, 2014, September 9, 2014, and November 5, 2014, respectively. The General Counsel issued the complaint (the complaint) on November 25, 2014.

The complaint alleges that Philmar Care, LLC d/b/a San Fernando Post Acute Hospital (Respondent or the Facility) violated Section 8(a)(1) of the National Labor Relations Act (the Act) by requiring its employees, as a condition of employment, since at least September 2011 to sign agreements that compel the employees to mandatory binding arbitration. The complaint further alleges that Respondent violated Section 8(a)(1) of the Act since at least May 9, 2014, when it asserted the mandatory arbitration agreement in litigation the Charging Party brought against it.

Respondent filed a timely answer on December 9, 2014.

On the stipulated record, and after considering the briefs filed by the General Counsel and Respondent,² I make the following³

FINDINGS OF FACT

I. JURISDICTION

At all times material, Respondent, a California limited liability company, operates a skilled nursing facility providing inpatient medical care in the State of California from its office and place of business in Sylmar, California, where it annually derives gross revenues in excess of \$250,000. Respondent purchased and received goods at its facility in California valued in excess of \$5000 directly from sources outside the State of California. Respondent admits and I find that it is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act, and has been a health care institution within the meaning of Section 2(14) of the Act.

II. ALLEGED UNFAIR LABOR PRACTICES

A. Arbitration Provision

Since at least September 2011, Respondent maintains a policy at its Facility titled, “Employee Acknowledgment and Agreement.” The “Employee Acknowledgment and Agreement” begins by an acknowledgment that the employee has received a copy of the Facility’s handbook and will familiarize himself with the content. Along with acknowledging the terms and conditions of employment, the “Employee Acknowledgment and Agreement” contain a provision that require employees’ employment-related claims to be submitted to binding arbitration (hereinafter, “arbitration provision”), which in rele-

vant part states:

I also understand that the Facility utilizes a voluntary system for alternative dispute resolution, which involves binding arbitration to resolve all disputes, which may arise out of the employment context. Because of the mutual benefits (such as reduced expenses and increased efficiency) which private binding arbitration can provide both the Facility and myself, I voluntarily agree that any claim, dispute, and/or controversy[. . .]which would otherwise require or allow resort to any court of other governmental dispute resolution forum between myself and the Facility [. . .] arising from, related to, or having any relationship or connection whatsoever with my seeking employment with, employment by, or other association with the Facility, whether based on tort, contract, statutory, or equitable law, or otherwise (with the sole exception of claims arising under the National Labor Relations Act which are brought before the National Labor Relations Board [. . .]) shall be submitted to and determined exclusively by binding arbitration under the Federal Arbitration Act [. . .].

[. . .]

I UNDERSTAND BY VOLUNTARILY AGREEING TO THIS BINDING ARBITRATION PROVISION, BOTH I AND THE FACILITY GIVE UP OUR RIGHTS TO TRIAL BY JURY.

I understand that this voluntary alternative dispute resolution program covers claims of discrimination and harassment under Title VII of the Civil Rights Act of 1964, as amended. By marking the box to the right, I elect to waive the benefits of arbitrating Title VII claims. [. . .]

[. . .]

MY SIGNATURE BELOW ATTESTS TO THE FACT THAT I HAVE READ, UNDERSTAND, AND AGREE TO BE LEGALLY BOUND TO ALL OF THE ABOVE TERMS.

[Jt. Exh.1 at Exh. A.]

From September 2, 2011, through October 30, 2012, as a condition of employment, Respondent instructed employees to sign the “Employee Acknowledgment and Agreement,” including the arbitration provision (Jt. Exh. 1).

B. The Charging Party’s Employment with Respondent

Respondent employed the Charging Party from September 7, 2011, until October 30, 2012. On or about September 7, 2011, the Charging Party signed the “Employee Acknowledgment and Agreement” as part of Respondent’s application process. By signing the “Employee Acknowledgment and Agreement,” the Charging Party became bound by its terms.

C. The Class Action Lawsuit

On April 18, 2013, the Charging Party filed a class action complaint against Respondent in the Superior Court of California, City of Los Angeles, in “Juan Cortes, an individual, on behalf of himself and all others similarly situated, Plaintiff,” Case No. BC 506333 (the lawsuit) (Jt. Exh. 1 at Exh. B).

Since at least May 9, 2014, Respondent maintained and en-

¹ Abbreviations used in this decision are as follows: “Jt. Exh.” for Joint Exhibit; “Exh.” for exhibit; “GC Br.” for the General Counsel’s brief; and “R. Br.” for the Respondent’s brief.

² The Charging Party filed a notice of joinder supporting the General Counsel’s positions in his brief, and therefore, did not file a separate brief in this matter.

³ Although I have included several citations to the record to highlight particular stipulations or exhibits, I emphasize that my findings and conclusions are based not solely on the evidence specifically cited, but rather are based on my review and consideration of the entire record.

forced the arbitration provision in its “Employee Acknowledgment and Agreement” by filing in response to the lawsuit a “Motion to Compel Arbitration and to Dismiss Class Action Claims” (Motion to Compel). The Motion to Compel moves the Superior Court of California to compel the Charging Party to individually arbitrate the class action wage and hour claims against Respondent (Jt. Exh. 1 at Exh. C). Respondent, since at least May 9, 2014, interprets its “Employee Acknowledgment and Agreement,” which is silent on class and representative actions, as requiring individual arbitration and does not permit class wide arbitration (Jt. Exh. 1 at Exh. C).

On July 18, 2014, the Charging Party filed an Opposition to Respondent’s Motion to Compel (Jt. Exh. 1 at Exh. D). On August 15, 2014, the Superior Court granted Respondent’s Motion to Compel and stayed the Charging Party’s class-wide claims (Jt. Exh. 1 at Exh. E).

III. ANALYSIS

In the joint motion, the parties agreed to the following issues:

(1)(a) Did Respondent violate Section 8(a)(1) by maintaining and enforcing its mandatory arbitration provision, which it required employees to sign as a condition of employment, as alleged in the complaint, by filing its May 9, 2014 Motion to Compel Charging Party Cortes to individually arbitrate class wage and hour claims?

(1)(b) Did Respondent violate Section 8(a)(1) by maintaining and enforcing its mandatory arbitration provision, as alleged in the complaint, by filing its May 9, 2014 Motion to Compel Charging Party Cortes to individually arbitrate class wage and hour claims, even if employees were not required to sign the arbitration provision as a condition of employment?

A. From September 2, 2011, through October 30, 2012, Respondent’s Arbitration Provision Violated Section 8(a)(1) of the Act

The complaint alleges, at paragraph 5, that since at least early September 2011, Respondent has required employees, as a condition of employment, to be bound by the mandatory arbitration provision within the “Employee Acknowledgment and Agreement” which Respondent interprets to require individual arbitration in violation of Section 8(a)(1).

In contrast to paragraph 5 in the complaint, the parties stipulated that from September 2, 2011, through October 30, 2012, as a condition of employment, Respondent required employees to sign the “Employee Acknowledgment and Agreement” which also contains the arbitration provision (Jt. Exh. 1). I find that even though the arbitration provision states that it is “voluntary,” from September 2, 2011, through October 30, 2012, it was a mandatory rule imposed by Respondent, and as such the arbitration provision should be evaluated in the same manner as any workplace rule. See *D. R. Horton*, 357 NLRB No. 184, slip op. at 15. Although Respondent continues to maintain the “Employee Acknowledgment and Agreement” with the arbitration provision, from October 30, 2012, to the present, the General Counsel failed to present sufficient evidence as to whether the arbitration provision continued to be a *mandatory* condition of employment imposed on Respondent’s employees, and thus, I do not find a violation of maintenance of the arbitration provi-

sion after October 30, 2012.

Section 8(a)(1) of the Act provides that it is an unfair labor practice for an employer to interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in Section 7 of the Act. The rights guaranteed in Section 7 include the right “to form, join or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection” The Board has consistently held that collective legal action involving wages, hours, and/or working conditions is protected concerted activity under Section 7. See, e.g., *Spandisco Oil & Royalty Co.*, 42 NLRB 942, 949–950 (1942); *United Parcel Service*, 252 NLRB 1015, 1018, 1022 fn. 26 (1980), enf’d. 677 F.2d 421 (6th Cir. 1982); *D. R. Horton, Inc.*, 357 NLRB No. 184 (2012), enf’d. denied in part 737 F.3d 344 (5th Cir. 2013), petition for rehearing en banc denied (5th Cir. No. 12–60031, April 16, 2014). In *Murphy Oil USA, Inc.*, 361 NLRB No. 72 (2014), the Board reaffirmed its ruling in *D. R. Horton*, where they held that mandatory arbitration agreements which preclude the filing of joint, class, or collective claims addressing wages, hours, or other working conditions in any forum, arbitral or judicial, is protected concerted activity and unlawfully restrict employees’ Section 7 rights, which violates Section 8(a)(1) of the Act. See also *Cellular Sales of Missouri, LLC*, 362 NLRB No. 27 (2015) (work rule reasonably construed to interfere with ability to file charges with the Board even if rule did not expressly prohibit access to the Board); *Chesapeake Energy Corp.*, 362 NLRB No. 80 (2015).

Since the Board’s issuance of *D. R. Horton* there have been several decisions issued by the Federal courts of appeal disagreeing with the Board’s analysis regarding mandatory arbitration agreements. *Sutherland v. Ernst & Young*, 726 F.3d 290 (2d Cir. 2013); *Owen v. Bristol Care, Inc.*, 702 F.3d 1050 (8th Cir. 2013); *Richards v. Ernst & Young, LLP*, 744 F.3d 1072 (9th Cir. 2013). However, the Board in *Murphy Oil* reexamined *D. R. Horton*, and determined that its reasoning and results were correct. The Board found that Section 8(a)(1) of the Act is violated when an employer requires its employees to agree to resolve all employment-related claims through individual arbitration. Mandatory arbitration agreements which bar employees from bringing joint, class, or collective actions regarding the workplace in any forum restrict employees’ substantive right established by Section 7 of the Act to improve their working conditions through administrative and judicial litigation.

When evaluating whether a rule, including a mandatory arbitration provision, violates Section 8(a)(1), the Board applies the test set forth in *Lutheran Heritage Village-Livonia*, 343 NLRB 646 (2004). See *U-Haul Co. of California*, 347 NLRB 375, 377 (2006), enf’d. 255 Fed.Appx. 527 (D.C. Cir. 2007); *D. R. Horton, Inc.*; *Murphy Oil*; *Cellular Sales*. Under *Lutheran Heritage*, the first inquiry is whether the rule explicitly restricts activities protected by Section 7. If it does, the rule is unlawful. If it does not, the violation is dependent upon a showing of one of the following: (1) employees would reasonably construe the language to prohibit Section 7 activity; (2) the rule was promulgated in response to [Section 7] activity; or (3) the rule has been applied to restrict the exercise of Section 7 rights. *Luther-*

an Heritage, 343 NLRB at 647. The Board in *D. R. Horton*, *Murphy Oil*, *Cellular Sales* and *Chesapeake Energy Corp.* found that mandatory arbitration policies expressly violate employees' rights to engage in protected concerted activity under the *Lutheran Heritage* analysis. The Board held that if an arbitration policy is required as a condition of employment, then that rule violates Section 8(a)(1) of the Act if employees would reasonably believe the policy or rule interferes with their ability to file a Board charge or access to the Board's processes, even if policy or rule does not expressly prohibit access to the Board. *Cellular Sales*, supra, slip op. 1 at fn. 4.

Here, it is undisputed that Respondent's arbitration provision had been maintained as a condition of employment from September 2, 2011, through October 30, 2012, as stipulated in the Joint Motion. On or about September 7, 2011, the Charging Party per Respondent's instructions signed the "Employee Acknowledgment and Agreement" which included the arbitration provision as part of Respondent's application process. Thus, I find that the arbitration provision was a mandatory rule imposed by Respondent as a condition of employment violating Section 8(a)(1) of the Act from September 2, 2011, to October 30, 2012. See *D.R. Horton*, supra, slip op. at 5; *Murphy Oil*, supra, slip op. at 24.

Turning to the period after October 30, 2012, the General Counsel argues that because the "Employee Acknowledgment and Agreement" has remained in effect since September 2011, the evidence clearly shows that Respondent has required employees to sign it as a condition of employment (GC Br. at 10). I disagree. After October 30, 2012, although this same "Employee Acknowledgment and Agreement," with the arbitration provision, continues to be in effect per the Joint Motion, the record is vague as to whether Respondent continues to require employees to sign the "Employee Acknowledgment and Agreement" as a condition of employment. Moreover, although the arbitration policy states that it is "voluntary," the record is silent as to how Respondent conveys to employees how they may option out of the arbitration provision. It is possible that the "voluntariness" of Respondent's arbitration policy after October 30, 2012, is illusory but the Joint Motion fails to provide necessary details to make this determination. In fact, in *D. R. Horton*, supra, slip op. at fn. 28, the Board declined to reach the more "difficult" issue of "whether, if arbitration is a mutually beneficial means of dispute resolution, an employer can enter into an agreement that is not a condition of employment with an individual employee to resolve either a particular dispute or all potential employment disputes through non-class arbitration rather than litigation in court." Thus, because the Joint Motion lacks specificity and because the General Counsel maintains the burden of proof, I cannot find a violation after October 30, 2012. However, I find that the arbitration provision was a mandatory rule imposed by Respondent as a condition of employment violating Section 8(a)(1) of the Act from September 2, 2011, to October 30, 2012. See *D.R. Horton*, supra, slip op. at 5; *Murphy Oil*, supra, slip op. at 24.

Respondent argues that since its arbitration policy specifically excludes claims under the Act that its arbitration policy does

not violate Section 7 of the Act (R. Br. at 8–11).⁴ Respondent's arbitration provision permits limited exceptions to which disputes must be resolved by binding arbitration including claims under the National Labor Relations Act and the California Workers' Compensation Act, and Employment Development Office claims (Jt. Exh. 1 at Exh. A). Despite the arbitration provision permitting Board charges, the arbitration provision creates an ambiguity as to whether an employee could file or join a class or collective action, and such ambiguity must be construed against Respondent as the drafter of the arbitration provision. See *Murphy Oil*, supra, slip op. at 26. Employees subject to the arbitration provision would reasonably construe it as waiving their right to pursue employment-related claims concertedly in all forums or that their right to file an unfair labor practice with the Board is restricted. Indeed, although the arbitration provision is silent as to whether class and/or collective actions are permitted, Respondent interprets its arbitration provision to require individual arbitration (Jt. Exh. 1; Jt. Exh. 1 at Exh. C), thereby precluding class or collective action in both judicial and arbitral forums. Moreover, Respondent's arbitration policy covers all disputes arising out of the employment context. It does not leave open any judicial forum, as required by the Board in *D.R. Horton*, nor does Respondent permit collective or class arbitration as evidenced by its Motion to Compel. *D.R. Horton*, supra, slip op. at 12.

Respondent cites to several Board decisions upholding workplace rules, none of which concern arbitration policies, and argues that its arbitration policy when narrowly construed should similarly be upheld (R. Br. at 8–11). However, the Board has repeatedly stated that broad language in defining the issues subject solely to arbitration is reasonably interpreted by employees to encompass and preclude the filing of unfair labor practice charges even if explicitly permitted. See *U-Haul Co. of California*, supra at 377–378 (agreement requiring arbitration of "all disputes relating to or arising out of an employee's employment [...] or the termination of that employment," including "any other legal or equitable claims and causes of action recognized by local, state, or federal law or regulations" violated Section 8(a)(1)). Recently, in *Cellular Sales*, the Board stated that Section 8(a)(1) is violated if the rule or policy interferes with employees' rights to file Board charges even if the rule or policy does not expressly prohibit Board charges. 362 NLRB No. 27, slip op. at fn. 4. Likewise, even permitting claims before the Board, I find that Respondent's arbitration policy violates Section 8(a)(1) of the Act due to its broad scope in subjecting all employment disputes to binding arbitration. *Murphy Oil*, supra, slip op. at 26.

Respondent argues I should not follow *Murphy Oil* and *D.R. Horton*. Respondent failed to provide valid arguments distinguishing its arbitration policy with the ones found in *D. R. Horton* and *Murphy Oil*. Because *Murphy Oil* and *D. R. Horton* are Board precedents that have not been overturned by the Supreme Court, I must follow them. *Manor West, Inc.*, 311 NLRB 655,

⁴ Respondent inappropriately raised this theory of the case for the first time in its brief. However, because the General Counsel prevails on this theory, the General Counsel is not prejudiced by not having the opportunity to brief the matter.

667 fn. 43 (1993); see also *Waco, Inc.*, 273 NLRB 746, 749 fn. 14 (1984) (“We emphasize that it is a judge’s duty to apply established Board precedent which the Supreme Court has not reversed. It is for the Board, not the judge, to determine whether precedent should be varied.”). The arguments made by Respondent as to why *D. R. Horton* and *Murphy Oil* were wrongly decided, including its rejection by the courts, must be made directly to the Board.

Respondent alleges that the Board’s rationale in *Murphy Oil* and *D. R. Horton* conflict with the FAA, 9 U.S.C. §§ 1 et. seq. However, the Board clearly set forth its reasons why the National Labor Relations Act does not conflict with or undermine the FAA. See *Murphy Oil*, supra, slip op. at 6. First, the Board found that mandatory arbitration agreements are unlawful under the FAA’s savings clause because they extinguish rights guaranteed by Section 7. Second, Section 7 amounts to a “contrary congressional command” overriding the FAA. Finally, the Board found that the Norris-LaGuardia Act indicates that the FAA should yield to accommodate Section 7 rights. The Norris-LaGuardia Act prevents enforcement of private agreements that prohibit individuals from participating in lawsuits arising out of labor disputes.

Furthermore, Respondent argues that *AT & T Mobility v. Concepcion*, 131 S.Ct. 1740, 1746 (2011), a Supreme Court decision issued after *D. R. Horton*, and other related case law, support the argument that *D. R. Horton* must be rejected. Again, the Board in *Murphy Oil* addressed those arguments, distinguishing that Section 7 of the Act substantively guarantees employees the right to engage in collective action, including collective legal action, for mutual aid and protection concerning wages, hours, and working conditions. See *Murphy Oil*, supra, slip op. at 7–9; *Chesapeake Energy Corp.*, supra, slip op. at 3.

Accordingly, I find that from September 2, 2011, through October 30, 2012, Respondent’s maintenance of the arbitration provision, as a mandatory condition of employment, prohibited employees from bringing forth claims against Respondent in a concerted manner which thereby violates Section 8(a)(1) of the Act as set forth in *D. R. Horton* and *Murphy Oil*. I do not find a violation after October 30, 2012, since the record is lacking sufficient evidence proving that Respondent continues to impose the arbitration provision as a mandatory rule.

B. Respondent’s Enforcement of its Arbitration Provision Violates Section 8(a)(1) of the Act

The complaint alleges, at paragraph 6, that Respondent enforced its arbitration provision in the Superior Court of California by moving the State court to dismiss the Charging Party’s class action lawsuit. The arbitration provision is a condition of employment, and is therefore treated in the same manner as other unlawfully implemented workplace rules. As set forth previously, when evaluating whether a rule, including a mandatory arbitration provision, violates Section 8(a)(1), the Board applies the test set forth in *Lutheran Heritage Village-Livonia*, supra. See *U-Haul Co. of California*, supra at 377 (2006), enf. 255 Fed.Appx. 527 (D.C. Cir. 2007); *D. R. Horton, Inc.*; *Murphy Oil*; *Cellular Sales*. In undertaking this analysis, the Board must refrain from reading particular phrases in isolation, and

must not presume improper interference with employee rights. *MCPc, Inc.*, 360 NLRB No. 39, slip op. at 7 (2014).

The inquiry here is whether the third prong of the *Lutheran Heritage* test, if the rule has been applied to restrict the exercise of Section 7 rights, is met. As set forth above, Respondent violated Section 8(a)(1) when it imposed the mandatory arbitration provision which the Charging Party was required to sign as a condition of employment. Respondent stipulated that it interprets the arbitration provision only to permit individual arbitration. Respondent further stipulated that it filed a Motion to Compel in response to the lawsuit filed by the Charging Party arguing that the arbitration provision only permits individual arbitration, thereby precluding class or collective action. Thereafter, the Superior Court of California granted Respondent’s Motion to Compel and stayed the Charging Party’s class-wide claims. It is well-settled that lawsuits which attempt to enforce contract provisions or policies which violate the Act constitute independent statutory violations. *Bill Johnson’s Restaurants*, 461 U.S. 731, 737–738 fn. 5 (1983), citing *Granite State Joint Board*, 187 NLRB 636, 637 (1970), enf. denied 446 F. 2d 369 (1st Cir. 1971), revd. 409 U.S. 213 (1972). Accordingly, I find that Respondent’s enforcement of the arbitration provision violates the Act since Respondent interprets its arbitration provision to preclude class or collective action. In doing so, I find that Respondent restricted the exercise of employees’ Section 7 rights in violation of Section 8(a)(1) of the Act.

CONCLUSIONS OF LAW

1. Respondent is an employer within the meaning of Section 2(2), (6), and (7) of the Act.

2. By requiring employees to sign and maintain, from September 2, 2011, through October 30, 2012, an arbitration provision within the “Employee Acknowledgment and Agreement” under which employees are compelled, as a condition of employment, to waive the right to maintain class or collective actions in all forums, whether arbitral or judicial, Respondent has engaged in unfair labor practices affecting commerce within the meaning of Section 2(6) and (7) of the Act, and has violated Section 8(a)(1) of the Act.

3. By enforcing the arbitration provision on May 9, 2014, at the Facility by moving to compel individual arbitration of the Charging Party’s class action lawsuit filed in State court, Respondent violated Section 8(a)(1) of the Act.

REMEDY

Having found that Respondent has engaged in certain unfair labor practices, I shall order it to cease and desist therefrom and to take certain affirmative action designed to effectuate the policies of the Act.

As I have concluded that the mandatory arbitration provision is unlawful from September 2, 2011 through October 30, 2012, the recommended Order requires that Respondent revise or rescinds it, and advises its employees in writing that the mandatory arbitration provision has been revised or rescinded.

Respondent shall post a notice in all locations where the mandatory arbitration policy, or any portion of it requiring all and/or enumerated employment-related disputes to be submit-

ted to individual arbitration, was in effect. See, e.g., *U-Haul of California*, supra, fn. 2; *D. R. Horton*, supra, slip op. at 17; *Murphy Oil*, supra, slip op. at 22. Respondent is also ordered to distribute appropriate remedial notices to its employees electronically, such as by email, posting on an intranet or internet site, and/or other appropriate electronic means, if it customarily communicates with its employees by such means. *J. Picini Flooring*, 356 NLRB No. 9 (2010).

I recommend Respondent be required to reimburse the Charging Party and any other plaintiffs for all reasonable expenses and legal fees, with interest, incurred in opposing the lawsuit and related expenses, with interest, to date and in the future, directly related to the Motion to Compel filed by Respondent related to the plaintiff's class action lawsuit in *Juan Cortes, an individual, on behalf of himself and all others similarly situated*, Case No. BC 506333. See *Bill Johnson's Restaurant v. NLRB*, 461 U.S. 731, 747 (1983) ("If a violation is found, the Board may order the employer to reimburse the employees whom he had wrongfully sued for their attorney's fees and other expenses" and "any other proper relief that would effectuate the policies of the Act."). Interest shall be computed in the manner prescribed in *New Horizons*, 283 NLRB 1173 (1987), compounded daily as prescribed in *Kentucky River Medical Center*, 356 NLRB No. 8 (2010). See *Teamsters Local 776 (Rite Aid)*, 305 NLRB 832, 835 fn. 10 (1991) ("[I]n make whole orders for suits maintained in violation of the Act, it is appropriate and necessary to award interest on litigation expenses."), enf'd. 973 F.2d 230 (3d Cir. 1992), cert. denied 507 U.S. 959 (1993).

I recommend that Respondent be required to ensure that the Charging Party has a forum to litigate his class action lawsuit by either: (1) withdrawing its Motion to Compel and requesting the State court to rescind its order staying the class action portion of the Charging Party's lawsuit; or (2) withdrawing its argument to the arbitrator that the arbitration provision precludes class or collective action, and that it will proceed with class-wide arbitration.

On these findings of fact and conclusions of law and the entire record, I issue the following recommended⁵

ORDER

Respondent, Philmar Care, LLC d/b/a San Fernando Post Acute Hospital, Sylmar, California, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Maintaining an arbitration provision that requires employees, as a mandatory condition of employment, to waive the right to maintain class or collective actions in all forums, whether arbitral or judicial.

(b) Enforcing (or attempting to enforce) the mandatory arbitration provision to prohibit class or collective action in all forums, whether arbitral or judicial.

(c) In any like or related manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed to them by Section 7 of the Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act.

(a) Rescind or revise the arbitration provision in all of its forms to make clear to employees that the provision does not require them, as a condition of employment, to waive their right to maintain employment-related joint, class, or collective actions in all forums, whether arbitral or judicial.

(b) Notify all current and former employees who were required to sign the "Employee Acknowledgment and Agreement" which included the arbitration provision, of the rescinded, or revised, arbitration provision, to include providing them with a copy of any revised provisions, acknowledgment forms, or other related documents, or specific notification that the arbitration provision has been rescinded.

(c) Notify the Superior Court of California, City of Los Angeles, in *Juan Cortes, an individual, on behalf of himself and all others similarly situated*, Case No. BC 506333, or an arbitrator, that it has rescinded or revised the arbitration provision upon which it based its Motion to Compel Juan Cortes' collective action, and inform the court or arbitrator that it no longer opposes the action on the basis of the arbitration provision.

(d) In the manner set forth in this decision, reimburse Juan Cortes for any reasonable attorneys' fees and litigation expenses that he may have incurred in opposing Respondent's Motion to Compel individual arbitration.

(e) Within 14 days after service by the Region, post at its facility in Sylmar, California, copies of the attached notice marked "Appendix."⁶ Copies of the notice, on forms provided by the Regional Director for Region 31, after being signed by Respondent's authorized representative, shall be posted by Respondent and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. In addition to physical posting of paper notices, the notices shall be distributed electronically, such as by email, posting on an intranet or an internet site, and/or other electronic means, if Respondent customarily communicates with its employees by such means. Reasonable steps shall be taken by Respondent to ensure that the notices are not altered, defaced, or covered by any other material. In the event that, during the pendency of these proceedings, Respondent has gone out of business or closed the facility involved in these proceedings, Respondent shall duplicate and mail, at its own expense, a copy of the notice to all current employees and former employees employed by Respondent at any time since September 1, 2011.

(f) Within 21 days after service by the Region, file with the Regional Director a sworn certification of a responsible official on a form provided by the Region attesting to the steps that Respondent has taken to comply.

⁵ If no exceptions are filed as provided by Sec. 102.46 of the Board's Rules and Regulations, the findings, conclusions, and recommended Order shall, as provided in Sec. 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.

⁶ If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."

3. It is further ordered that the complaint is dismissed insofar as it alleges violations of the Act not specifically found.

Dated, Washington, D.C. May 6, 2015

APPENDIX

NOTICE TO EMPLOYEES
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

The National Labor Relations Board has found that we violated Federal labor law and has ordered us to post and obey this Notice.

FEDERAL LAW GIVES YOU THE RIGHT TO

Form, join, or assist a union.

Choose representatives to bargain with us on your behalf.

Act together with other employees for your benefit and protection.

Choose not to engage in any of these protected activities.

WE WILL NOT maintain and/or enforce an arbitration provision that requires employees, as a condition of employment, to waive the right to maintain class or collective actions in all forums, whether arbitral or judicial.

WE WILL NOT enforce an arbitration provision by requiring the Charging Party Juan Cortes to agree to the arbitration provision.

WE WILL NOT enforce an arbitration provision by asserting it in litigation the Charging Party Juan Cortes brought against us.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce you in the exercise of the rights listed above.

WE WILL rescind the requirement that employees enter into or sign the arbitration provision that is currently in effect, as a condition of employment, and expunge all such provisions at all of Respondent's facilities where Respondent has required employees to sign such provisions.

WE WILL rescind or revise the arbitration provision in all its forms to make clear to employees that the provision does not constitute a waiver of their right to initiate or maintain employment-related collective or class actions in arbitrations and in the courts, and that it does not restrict the employees' right to file charges with the National Labor Relations Board.

WE WILL notify all current and former employees who were required to sign the arbitration provision in any of its forms that the arbitration provision has been rescinded or revised and, if revised, provide them a copy of the revised agreement.

WE WILL notify the court or the arbitrator in which Juan Cortes filed his collective action claim that we have rescinded or revised the arbitration provision upon which we based our Motion to Compel individual arbitration, and WE WILL inform the court or the arbitrator that we no longer oppose Juan Cortes' collective claim on the basis of that agreement.

WE WILL reimburse Charging Party Juan Cortes for all reasonable attorneys' fees and litigation expenses that he may have incurred in opposing our Motion to Compel individual arbitration in his collective claim.

PHILMAR CARE, LLC /D/B/A SAN FERNANDO POST
ACUTE HOSPITAL